IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2005 of 1986

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI Sd/-
and
Hon'ble MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

THAKKAR INDRAVADAN CHIMANLAL

Versus

THE DIRECTOR OF STATE LOTTERIEGOVT.OF GUJARAT.

Appearance:

MR RD PATHAK for Petitioners No. 1-2

MR HL JANI,AGP. for Respondents No. 1-3

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI
and
MR.JUSTICE D.A.MEHTA

Date of decision: 19/02/2002

CAV.JUDGEMENT

(Per : MR.JUSTICE D.A.MEHTA)

1 This is a petition filed under Article 226 of the COnstitution of India whereby the petitioner has challenged the entry no.120 inserted under Section 7, Clause (24) of The Gujarat Sales Tax (Second Amendment) Act,1986 (hereinafter referred to as the 'Amendment Act')

in Schedule II, Part-"A" to the Gujarat Sales Tax Act,1969 (hereinafter referred to as 'the Act'), on the ground that the said amendment is violative of Articles 14, 19(1)(g), 265, 301 and 304 of the Constitution of India and is thus ultravires and beyond the legislative competence of the State Legislature. The petitioner has also challenged the circular issued by respondent No.1 as being violative of Articles 14, 19(1)(g), 301 and 304 of the Constitution.

2 At the time of hearing Shri R.D.Pathak, learned Counsel appearing on behalf of the petitioners stated that the first challenge to entry inserted by the Amendment Act is not being pressed as the same is already decided against the petitioner by the decision in case of H.Anraj v. Government of Tamil Nadu,61 STC 165(S.C). That leaves only challenge to circular (Annexure A/1) dated 31/3/1986 issued by respondent No.1.

3 The essential facts necessary for deciding the controversy are that petitioner No.1 has been Agent of respondent No.1 since 1981. Thus, he is entitled to purchase lottery tickets from respondent No.1 and sell the same to the customers. Petitioner No.1 is also a stockist of lottery tickets of other States having authority to appoint Agents to sell the said lottery tickets. Petitioner No.1 is an individual while petitioner No.2 is a registered partnership firm. Petitioner No.2 is also an Agent appointed by respondent No.1 since about a year and a half as well as agent of various other States for purchasing lottery tickets and selling the same. Respondent No.1 is an Officer appointed by respondent No.3 - State and is required to administer the Gujarat State Lottery Scheme Under the Gujarat State Lottery Rules,1981 and is known as "Director of State Lotteries".

4. On behalf of the petitioner Mr.Pathak contended that under Rule 18 of the Gujarat State Lottery Rules, it has been provided that an agent shall purchase tickets in books on payment of full value of tickets less commission liable on the face value of the tickets and the commission will be allowed at source. That prior to 1981, respondent No.3 - State of Gujarat was not running any lottery scheme on its own but the petitioners were selling lottery tickets of other States in the State of Gujarat by virtue of their appointment as stockist and/or agents. For the sake of ready reference the expression "State lotteries" shall mean lottery tickets of the State of Gujarat while the expression "Other lotteries shall mean lottery tickets of other States except State of

Gujarat.

5 Upto 31/3/1986 the sale of lotteries in the State of Gujarat was not subject to any tax. However, by the Amendment Act sale of lottery tickets was made liable to tax at the rate of 10% from 1/4/1986. Furthermore, the effective rate of sales tax by virtue of Provisions of Section 4A of the Act was 11%, as 10% of the tax was levied as additional tax. It was therefore submitted that the petitioners became liable to be registered under the provisions of the Act and became liable to pay sales tax on the sales made in relation to "Other lotteries". However, in so far as the sales of "State lotteries" were concerned, the petitioners were not required to pay any tax as the sales were of goods purchased from a registered dealer. This situation, according to Mr.Pathak came about by virtue of the impugned circular at Annexure A/1 whereunder respondent No.1 had specifically stated that as the first sale of lotteries was made at the stage of respondent No.1 the liability to pay tax on such sales under the Act was of the Director of State Lotteries and hence in effect the "State lotteries" were being exempted from sales tax while "Other lotteries" were being subjected to sales tax resulting in hostile discrimination. It was further submitted that the virtual effect, therefore, was that so far as the "Other lotteries" were concerned, they would be sold at a price higher than the "State lotteries" inspite of both the types of tickets being in same category involving identical chance of prize. In support of this submission, Mr.Pathak placed heavy reliance on the decision of the Supreme Court in case of H.Anraj v. Government of Tamil Nadu, 61 STC 165 at page 184 onwards. It was submitted that what had to be taken into consideration was that the tax burden was on the goods and the imported goods were at a disadvantage as compared to indigenous goods. That the question had to be considered from the point of view of the purchaser and from the normal business or commercial point of view and if this approach was adopted it was apparent that the impugned circular hampered free flow of trade, commerce and intercourse.

6 As against this, Mr.Jani, learned Assistant Government Pleader appearing on behalf of the respondent submitted that the first respondent was a Dealer within the meaning of the Act and had been registered as a Dealer under the Act. From the affidavit-in-reply it was pointed out that the Amendment Act brought lottery tickets within the sweep of the Act so as to levy tax on sales with the object of augmenting revenue of the State

of Gujarat. If this object was kept in mind it could not be stated that there was any hostile discrimination in relation to agents selling tickets of "Other lotteries" and agents selling tickets of "State lotteries".

7 The definition of "dealer" is given under Section 2(10) of the Act wherein it is stated that "dealer" means any person who buys or sells goods in connection with his business and includes a State Government. On reading clause (10) of the definition section it is apparent that various persons have been included within the meaning of dealer under the said clause and the State Government is one of them. Clause (12) of Section 2 defines "goods" to mean all kinds of movable property etc. and "taxable goods" are defined under clause (33) of Section 2, to mean goods other than those on the sale or purchase of which no tax is payable under Section 5 or Section 49 or a Notification issued thereunder. Incidence of tax is provided under Section 3 of the Act and it also specifies what is taxable event. Section 3A deals with liability to pay tax on transfer of right to use goods as specified. Section 7 levies sales tax at the first stage of sale of goods specified in Schedule II, Part 'A', while general sales tax is levied at the last stage of sale of goods specified in Schedule II part "B" as laid down in Section 8 and it is further specified that the last stage of sale means a sale by the last licenced dealer to unlicenced dealer. Section 29 of the Act provides for compulsory registration of a dealer after making an application in the prescribed manner to the prescribed authority. Section 56 lays down prohibition against collection of tax in certain cases and relevant extract which is relevant for our purpose reads as under:

"56. Prohibition against collection of tax in certain cases :

[1] No person shall collect any sum by way of tax [in respect of sale or specified sale of any goods] on which by virtue of section 5 or section 49 or a notification issued thereunder no tax is payable.

[2] No person selling any goods shall collect from the purchaser any amount by way of tax unless such person is a registered dealer and is liable to pay the tax in respect of such sale.

[3] Subject to sub-sections [1] and [2], no dealer shall collect any amount by way of tax in excess of the amount of tax payable by him under the provisions of this Act in respect of any transaction :

Provided that sub-sections [2] and [3] shall not apply where a person is required to collect such amount of the tax separately in order to comply with the conditions and restrictions imposed on him under the provisions of any law for the time being in force."

8 Thus, broadly the scheme of the Act as can be seen is that the tax is leviable on every sale when the sale is made for the first time and such a sale is liable to tax in relation to taxable goods. In other words, not all goods are liable to tax. Taxable goods are other than those on which no tax is payable under Section 5 or Section 49 or a Notification issued thereunder. Section 56(1) provides that no person shall collect any tax in respect of the goods which are not taxable goods. Section 56(2) of the Act states that only registered dealer who is liable to pay tax in respect of sale shall be permitted to collect tax from the purchaser and the limit to which such tax can be collected by a registered dealer is provided in Section 56(3) of the Act. In other words on a conjoint reading of the provisions of the Act what emerges is that a dealer is required to be registered under Section 29 of the Act and such registered dealer becomes liable to tax on sale of taxable goods at the point of time of first sale and such a registered dealer would be entitled to collect tax from the purchaser to the extent of the tax payable by such registered dealer. Thus, it can be seen that Section 56 is an enabling provision in so far as the registered dealer is concerned. The provision permits a registered dealer to collect tax to the extent of tax which he is liable to pay on the transaction of sale made by him at the first instance and such tax can be collected by him from his immediate purchaser. However, the section nowhere provides that a registered dealer shall collect tax from his purchaser.

9. The impugned circular at Annexure A/1 is reproduced hereunder in entirety so as to enable us to ascertain whether the challenge raised by the petitioner is sustainable or not.

" ANNEXURE A/1

English Translation of the
Circular dated 31-3-86
issued by the respondent no.1.

No.D.O.L.DBO/VE.VERA.86
Office of the Director of
Lotteries,
Block No.11, Second Floor,
Old Sachivalaya,
Gandhinagar.

Date : 31-3-86.

Subject : Regarding the payment of sales tax on the sales of Gujarat State lotteries.

CIRCULAR:-

It is hereby informed to all the agents that from 1/4/86 it has been decided by amending the Gujarat Sales Tax Act,1969 to levy sales tax at the first stage of the sales of lotteries. The rate of sales tax is 10% and on this amount of tax 10% surcharge is leviable. Thus total rate of tax shall be 11%.

On account of the amendments made in the Gujarat Sales Tax Act, the dealers doing the business of selling lotteries shall have to obtain Registration Certificate under the said Act, for which the limit shall be as under:

1. If the dealer imports lotteries from outside the State of Gujarat worth Rs.1000/- (One thousand) during the year, he shall have to obtain registration compulsory if his total annual turnover exceeds Rs.10,000/-.

2. In the case not covered under 1 above, registration shall be compulsory if the annual turnover of sales exceeds Rs.1.25 lakhs.

On the sales of lotteries taking place in the State of Gujarat, first stage sales tax is exigible. So far as the lotteries of the Gujarat State are concerned, such sales are made by the Director of Gujarat State to the agents and, therefore, the first stage of lotteries are made at the stage of Director of Gujarat State Lotteries and, therefore, the liability to pay tax on

such sales under the Act is of the Director of Gujarat State Lotteries. Under the provisions of the Sales Tax Act, on the resales of goods purchased from registered dealers, no tax is leviable at any stage and, therefore, on the sales of 'Gurjarlaxmi' lotteries, you will not be liable to pay tax. But in case if under the provisions of the Sales Tax Act, your annual turnover exceeds Rs.1.25 lakhs, it will be necessary for you to obtain registration, but you will not be liable to pay sales tax which may please be noted. If any dealer of lotteries intends to obtain registration under the Gujarat Sales Tax Act even if his turnover is less than Rs.1.25 lakhs, there is a provision for getting such registration.

It is necessary to note at this stage that under the Sales Tax Act if there is a sale of any goods purchased from registered dealer, no sales tax is payable. But if any goods on which sales tax has been paid are purchased from unregistered dealer, such purchaser has to pay sales tax. This provision is applicable to the sales of lotteries.

For 'Gurjarlaxmi` the price of ticker for weekly/monthly draw is Re.1 and price for bumper draw is Rs.2/-. Inspite of the application of Sales Tax Act, the price of tickers will be as they were and you will be given these tickers after deducting the amoaunt of commission as per existing arrangement and you shall have to charge from your customer rupee one in case of weekly/monthly draw and rupees two in case of bumper draw.

Under the Gujarat Sales Tax Act, the application for registration is to be made in form no.1. You are requested to contact the local Sales-tax Officer for obtaining guidance for procedure like registration under the Sales Tax Act.

The clarifications made by this circular are for the purposes of general guidance of the dealers and for the purposes of legal interpretation or liability arising on account of the same, you shall have to act according to the provisions of the Gujarat Sales Tax Act which please may be noted.

Sd/- Illegible.

Director
Gujarat State Lotteries
Gandhinagar.

Copy sent to :

(1) All agents.
(2) All District Treasury/Sub-Treasury Officers.
(3) All Collectors.

True Translation

(R.D.Pathak) "
(emphasis supplied)

10 On reading the circular as a whole it is apparent that respondent No.1 has merely drawn the attention of various dealers to the provisions of the Act and the overall scheme by which the sales tax is levied on lottery tickets. On a plain reading of the circular we do not find that any exemption has been granted by the said circular as contended on behalf of the petitioners. As already seen hereinbefore, the scheme of the Act provides for liability to sales tax when the first sale is effected and that is what is stated in the impugned circular. Furthermore, it is stated that on the resale of goods purchased from registered dealers, no tax is leviable at any further stage and hence the dealer would not be liable to pay tax as respondent No.1 has already become liable to pay tax on such sales under the Act, he being the registered dealer and having effected the first sale of "State lotteries".

11 It is pertinent to note that the circular is not issued by any competent authority empowered to issue a circular under the Act, but is by respondent No.1 who is Director of State Lotteries. Therefore, as per the provisions of the Act, respondent No.1 is not in a position to grant exemption from sales tax under the Act. It is not possible to state that the impugned goods viz. the lottery tickets of the State lottery are those goods as specified in Section 5 or Section 49 of the Act, by virtue of which the State Government has issued a Notification for exempting the tax on such goods. It is further necessary as provided in Section 5(3) of the Act and Section 49(2) of the Act that every such Notification issued by the State Government shall be published in the official gazette and shall be laid on the table of the State Legislature. The Act, therefore, by virtue of the provisions of Sections 5 and 49 of the Act has prescribed procedure by which certain goods can be taken out of the sweep of taxable goods and such powers are not available by way of an administrative function but derived under statute by the very provisions. Therefore, testing the

circular from this angle it is apparent that it is not only not issued under the Act but it has no statutory force. Therefore, even if for the sake of argument, the contention of the petitioners that the "State lotteries" are exempted by the said circular is to be accepted, as the circular does not have any statutory backing, it cannot override the provisions of the Act.

12. Considering the matter from slightly different angle, it is well settled that a circular cannot go beyond the provisions of the Act. Infact, the circular states what is the scheme under the provisions of the Act. The provisions of the Act have not been challenged and if the circular states only what the provision states it is not possible to hold that the circular creates a situation resulting in any hostile discrimination.

13. In the decision of H.Anraj (supra) exemption Notification issued by the State Government of Tamil Nadu was alleged to be violative of Articles 14, 19(1)(g), 301 and 304(a) of the Constitution. As can be seen from the facts narrated in the judgment lottery tickets in the State of Tamil Nadu became taxable by virtue of amendment resulting in increasing the face value of the tickets to the extent of sales tax, surcharge or additional surcharge payable on the same. This position was reviewed by the Government with a view to reduce the burden of tax on Tamil Nadu raffles which was being passed on to the buyers in addition to the face value. With that object the State Government issued the Notification in question bringing into force an arrangement whereby the sale price of the ticket was retained at its face value and the tax was not passed on to the licenced dealer or the purchaser. This was challenged by the petitioners by stating that the sale of lottery tickets of other Governments within the State of Tamil Nadu were at a disadvantage as compared to sale of Tamil Nadu Government lottery tickets and hence the said Notification was challenged mainly as being violative of Article 301 read with Article 304(a) of the Constitution. After considering various submissions made on behalf of both the sides the Apex Court held as follows :

" xxx xxx These aspects cannot obliterate the glaring fact that because of the notification imported goods are at a disadvantage as compared to indigenous goods, both being of identical type. The real question is whether the direct and immediate result of the impugned notification is to impose an unfavourable and discriminatory tax burden on the imported goods (here lottery

tickets of other States) when they are sold within the State of Tamil Nadu as against indigenous goods (Tamil Nadu Government lottery tickets) when these are sold within the State from the point of view of the purchaser and this question has to be considered from the normal business or commercial point of view and indisputably if the question is so considered the impugned notification will have to be regarded as directly and immediately hampering free flow of trade, commerce and intercourse. Discriminatory treatment in the matter of levying the sales tax on imported lottery tickets which are similar to the ones issued by the State Government so as to hamper free flow of trade, commerce and intercourse is writ large on the face of the impugned notification and in my view the same is clearly violative of article 301 and read with article 304(a) of the Constitution".

(emphasis supplied).

14. Though the aforesaid decision of the Apex Court at first blush seems to support the case of the petitioners, we shall hereinafter point out how it is not so. The Apex Court in the case of C.I.T. vs Sun Engineering Works P.Ltd. 198 ITR 297, has stated thus at page 320 as regards the approach to be adopted while reading a decision of Apex Court :

"It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this court, divorced from the context of the question under consideration and treat it to be the complete 'law' declared by this court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this court. A decision of this court takes its colour from the questions involved in the case in which it is rendered and, while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of this court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this court, to support their reasonings xxx xxx"

15. Thus, applying the aforesaid test and from the

facts in the context of which the decision was arrived at by the Apex Court in the case of H.Anraj (supra), it is apparent that the levy in question had the effect of increasing the face value of the tickets to the extent of tax payable on the sales and to obviate this situation the Government of Tamil Nadu issued Notification in question. What is more important as can be seen from the underlining supplied by us in the relevant extract of the Apex Court decision is the fact that the lottery tickets were similar i.e. the lottery tickets of other States were found to be similar to one issued by the Government of Tamil Nadu. In the present case, it shall have to be examined as to whether the impugned circular Annexure A/1 was issued with such an object viz. to reduce the burden of tax on "State lotteries" and whether the "State lotteries" were similar in nature to the "Others lotteries". Infact the impugned circular does not state that the same was issued with the object of reducing tax burden on "State lotteries". During the course of hearing we had specifically inquired of the Counsel for the petitioners as to what was the evidence to show that the "State lotteries" and the "Other lotteries" were similar in nature and we were informed that, that fact will have to be presumed in light of the wordings of Article 304 of the Constitution. The said article reads as under :

"304.Restrictions on trade, commerce and intercourse among States. -

Notwithstanding anything in Article 301 or Article 303. the Legislature of a State may by law -

(a) impose on goods imported from other States (or the Union territories) any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and

(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest :

Provided that no Bill or amendment for the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the

previous sanction of the President....."

16. The article only states that it will be open to a State Legislature to impose on goods imported from other States any tax to which similar goods manufactured or produced in that State are subjected to and in levying such a tax there shall be no discrimination between such imported goods and such manufactured or produced goods. The article nowhere provides that the nature of the imported goods and goods manufactured or produced being similar has to be presumed. In fact, the article only enables the State Legislature to levy tax on goods imported from other States provided similar goods produced or manufactured in the State bear the same tax. Thus, the first requirement is that the goods of the State are liable to tax and the imported goods, if they are similar in nature can be brought within the purview of the tax by the State Legislature.

17. As to whether the imported goods vis-a-vis goods manufactured or produced in the State are similar in nature or not, will have to be established by bringing facts and cogent evidence on record. In the present case we have nothing before us except a statement made by the petitioners without any supporting evidence. To the contrary, the affidavit-in-reply filed on behalf of the respondents state that there are no standardised price of tickets of lotteries and even in the case of lotteries organised by the same State the prize of tickets vary from draw to draw or from time to time depending upon several factors. Therefore, we are left with a situation that there is no evidence on record in support of the contention of the petitioner as to similarity of the lottery tickets and on the other hand, the averment as to the said aspect is disputed on behalf of the respondents by referring to the various probabilities of "State lotteries" being dissimilar in nature to the "Other lotteries".

18. Even otherwise though the commodity may appear to be similar in nature, it is well known that different brands of the goods answering the same description would fetch different prices and thus in absolute terms would be different from each other though falling within the same category of goods. In relation to lottery tickets even if two different lottery tickets are priced similarly i.e. having same face value their inherent characteristic would make them different on the basis of the prize offered, total number of tickets issued in a lot, as well as the nature of prize offered being

different in quantity and quality. If these factors are borne in mind it is not possible to accept the contention on behalf of the petitioners that as the "State lotteries" and "Other lotteries" were similar in nature, by virtue of impugned circular Annexure A/1, hostile discrimination was created.

19. The jurisdiction of the Court under Article 226 of the Constitution, howsoever wide and plenary, cannot extend to ascertainment of facts in case where the averment is not supported by any evidence on record and is further more disputed by the respondent in the reply affidavit. This is the position in the case at hand. In this situation the averment made by the petitioner and contested by the respondent cannot be accepted by the Court on disputed question of fact.

20. What is more pertinent is the fact that both the "State lotteries" and the "Other lotteries" are liable to tax at the same rate which is payable by the registered dealer when the first sale is effected. It is nobody's case that the "State lotteries" have not borne the levy.

21. Hence :

[i] Impugned circular Annexure A/1 only reiterates the scheme of the Act.

[ii] The circular does not exempt levy of tax, because, firstly, it is not within the competence of respondent No.1, and secondly, circular is not issued either under section 5 or section 49 of the Act.

[iii] The scheme of the Act envisages levy of tax on the first sale by a registered dealer and respondent No.1 is a registered dealer, who effects first sale.

[iv] Section 56 of the Act provides for prohibition and stipulates condition when tax can or cannot be collected by a registered dealer from a purchaser but it does lay down by implication that a registered dealer must collect tax from the purchaser.

[v] The petitioners have not been able to establish similarity between the "State lotteries" and "Other lotteries".

21. The petition therefore fails. Rule is discharged. There shall be no order as to costs.

Sd/-
(D.M.Dharmadhikari, C.J.)

Sd/-
(D.A.Mehta, J)

m.m.bhatt